In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1706

JANICH BROS., INC., a corporation,
Petitioner,

vs.

THE AMERICAN DISTILLING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on December 14, 1977 as amended on March 1, 1978 which affirmed the Order of the United States District Court for the Northern District of California directing a verdict against petitioner on its claim under section 2 of the Sherman Act, 15 U.S.C. §2, and denying petitioner's motion for a new trial on its claim under the Robinson-Patman Act, 15 U.S.C. §13(a).

OPINIONS BELOW

The opinion and amended opinion of the Court of Appeals review of which is sought is reported at 1978-1 Trade Regulation Reporter, ¶61,826, ... F.2d ......, and is set forth in Appendices A and B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 14, 1977. A timely petition for rehearing was filed on December 28, 1977 and the Court of Appeals filed its amendment of opinion and denied the petition for rehearing on March 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves section 2 of the Sherman Act, 15 U.S.C. § 2; section 2(a) of the Clayton Act, 15 U.S.C. §13(a); section 4 of the Clayton Act, 15 U.S.C. §15 and Rule 50(a) of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress in enacting the Robinson-Patman Act thereby amend section 2 of the Sherman Act so that the "substantial effect on competition" test set forth in the Robinson-Patman Act became the exclusive standard against which conduct alleged to constitute an attempt to monopolize was to be measured?

2. May a Court properly direct a verdict against a plaintiff on a claim for attempted monopolization in violation of section 2 of the Sherman Act where it is admitted by a dominant seller that for in excess of 10 years continuous discriminatory sales were made by it in interstate commerce and that a substantial number of such sales were made below cost and where the trial court has determined that there is sufficient evidence to support a jury finding that such sales in fact had a substantial effect on competition?

3. Does a failure by a jury to find that discriminatory pricing practices alleged to violate the Robinson-Patman Act have a substantial effect on competition operate to *ipso facto* bar submission to a jury of a claim that such practices when considered together with below cost pricing and other conduct violate section 2 of the Sherman Act?

4. Can continuous pricing below cost by a dominant seller ever be evidence of unreasonable or predatory conduct unless it is admitted that the prices are below "marginal" or "average variable" cost?

5. Does an instruction by a Court to a jury in a federal antitrust case that any damages awarded by the jury will be trebled constitute an unwarranted injection of an alien factor into the jury's deliberative process and an undue interference with the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States.

6. Does repeated *sua sponte* interruption and erroneous contradiction of counsel's statement of evidence made

before a jury and during counsel's rebuttal argument comport with fundamental notions of federal due process and fair play.

STATEMENT OF THE CASE

A. The Nature of the Case

This is a private antitrust suit brought by petitioner against respondent under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26, to secure damages and injunctive relief for violations of section 2 of the Sherman Act, 15 U.S.C. §2, and section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(a).

B. Material Facts

Petitioner, Janich Bros., Inc., was a California corporation having its principal place of business in Newark, California. It was a small independent company engaged in the business of processing, bottling and distributing popular priced lines of alcoholic beverages including private label gin and vodka in California.

Respondent, The American Distilling Company, is a large national corporation organized under the laws of the State of Maryland with its principal place of business in New York City. Respondent is engaged in the manufacture and sale of alcoholic beverages including private label gin and vodka and markets its products throughout the United States and in foreign countries. It has manufacturing facilities located in Pekin, Illinois and Union City, California.

In an action initiated in 1967, Janich claimed that since 1963 American had attempted to monopolize the sale of

private label gin and vodka in California in violation of section 2 of the Sherman Act, 15 U.S.C. §2. In addition, Janich claimed that American had sold gin and vodka of like grade and quality at discriminatory prices in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). Janich also claimed that as a result of these activities, it was precluded from making sales of private label gin and vodka to large chain store retailers and also suffered a loss of customers and reduced sales to its existing customers.

American counterclaimed, alleging that Janich, at least since 1962, had engaged in price discrimination in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). In addition, American charged that Janich, since 1961, had engaged in a conspiracy to set prices in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

A jury was selected and after the close of Janich's case, the district judge directed a verdict dismissing the attempt to monopolize claim. At the end of the entire case, the jury returned its verdict in favor of American on Janich's Robinson-Patman claim. Subsequent to the jury verdict, American moved for and the district court ordered a dismissal of the counterclaim.

At trial Janich proved that, continuously from 1963 until 1974, American employed a two price system in its sales of gin and vodka and that, in each instance, the lower leg of the discriminatory interstate system was in California. Thus, the jury was instructed by the trial court to find that during the period May 17, 1963 to May,

1974 The American Distilling Company sold its gin and vodka in California at lower prices than it sold gin and vodka of like grade and quality in other states. There was no cost justification defense made at trial and no evidence that any of the discriminatory prices charged by American in California were set in response to competition.

During the period 1960-1974, when Janich and American were engaged in competition for the sale of gin and vodka to California accounts, American's position in the California alcoholic beverage market substantially increased from approximately 20% in 1960 to 60% in 1972.

American sold private label gin and vodka ("white goods") and its own national brand scotch and bourbon whiskies ("brown goods") to the same California wholesalers and large chain store retail accounts. The evidence was that American realized substantial profits on its California sales of brown goods and that it sold its white goods in California at a loss.

The evidence showed that from 1962 continuously to 1968 American knowingly and admittedly sold substantial quantities of its private label gin and vodka to California accounts below its bare cost of production. When taken in its totality the evidence was sufficient to show that all of American's prices on private label gin and vodka to California chain stores and wholesalers were, at least arguably, below cost.

On November 1, 1963, at a time when its prices were already below cost, American lowered its half gallon price per case by seventy cents on vodka and sixty cents on gin. These price levels were maintained until July

1, 1965, notwithstanding known increases in the cost of production. In July, 1965, American established a wholesale price on half gallons of gin and vodka of $28.85 knowing that its bare cost of production was over $29.95.

Finally, the evidence at trial was that Janich and other competitors of American lost substantial portions of their gin and vodka sales to American or went out of business and that at least one competitor of American was forced to sell below cost in order to attempt to compete with American's admittedly below cost prices.

All of the above referenced conduct and other practices and circumstances were argued by petitioner to the District Court in support of submission of the section 2 attempt to monopolize claim to the jury. The District Court took the section 2 claim from the jury on American's motion for a directed verdict on the ground that, in the absence of a showing by Janich of the prices being charged for gin and vodka by companies other than American, American's below cost prices were not capable of being found unreasonable.

During final argument and specifically during rebuttal the District Court continuously acted on its own motion to erroneously contradict petitioner's counsel as to the state of the evidence and other matters. Finally, the District Court instructed the jury over strong objection by petitioner that any damages which it might award would be trebled in amount.

Neither the District Court nor the Circuit Court mentioned or discussed the totality of the evidence received in support of Janich's section 2 claim. The Court of Appeals

specifically compartmentalized certain of the evidence admitted and, with respect to each item considered, made separate rulings that it could not when viewed by itself constitute predatory conduct.

Although the Court of Appeals properly stated the rule that it must view all of the evidence and all reasonable inferences which might be drawn from the evidence in the light most favorable to Janich, it in fact did neither. It manifestly and totally ignored the evidence of American's market dominance (60%) and erroneously limited its review of below cost pricing to those instances actually admitted by American.

Petitioner brought several of the most glaring factual misstatements to the attention of the Court of Appeals whereupon the Court of Appeals filed its amendment of opinion and compounded the error.

Petitioner makes application for a writ of this Court to review and correct the profound miscarriage of justice which has resulted from the decisions below and to reverse the demonstrably erroneous view of the courts below concerning the scope and intendment of section 2 of the Sherman Act.

REASONS FOR GRANTING THE WRIT

A. THE RULE ANNOUNCED BY THE CIRCUIT COURT THAT THE "SUBSTANTIAL EFFECT ON COMPETITION" TEST SET FORTH IN THE ROBINSON-PATMAN ACT MUST BE APPLIED TO A CLAIM FOR ATTEMPT TO MONOPOLIZE UNDER SECTION 2 OF THE SHERMAN ACT PRESENTS A MOST IMPORTANT AND FAR REACHING FEDERAL QUESTION.

There are several sound and important reasons for granting the writ prayed for by petitioner. Firstly, as set forth on the face of its written opinion, the Court of Appeals has engrafted a Robinson-Patman requirement onto a section 2 Sherman Act claim by its holding that "a geographical price differential cannot sustain a charge of attempted monopolization unless it is shown to have a substantial effect on competition".

In the first instance, petitioner's claim of attempted monopolization was based not only upon a program of continuous and severe discrimination in interstate price but upon a record which included evidence of defendant's growth in market share during the relevant period from 20% to 60% and evidence, both direct and circumstantial, that defendant had continuously and knowingly sold its gin and vodka below cost in competition with petitioner.

As stated in *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911), section 2 of the Sherman Act, 15 U.S.C. §2, was:

> "intended to supplement [section 1 of the Sherman Act], and to make sure that by no possible guise could the public policy embodied in [section 1 of the Sherman Act] be frustrated or evaded." *Id.* at 516.

The decision of the Court of Appeals that section 2 of the Sherman Act must be construed by reference to and be limited by section 2(a) of the Clayton Act, 15 U.S.C. Section 13(a) is anomalous. The Robinson-Patman Act was clearly intended to broaden the scope of the Clayton Act so that certain particular practices which emerged as a result of chain store buying tactics might be made subject to penalty and civil suit, 80 Congressional Record, 8102-8140. There isn't the slightest hint in the Congressional debates that Congress, in enacting the Robinson-Patman Act, intended to narrow the scope of the Sherman Act.

The traditional factors looked to in connection with a claim for attempted monopolization made under section 2 of the Sherman Act are a specific intent to control prices or to foreclose competition with respect to a part of commerce and predatory conduct directed to that end. There is now and, until this Court makes a definitive ruling, will be a wide divergence of opinion between the circuit and district courts as to what kinds of conduct or evidence might be properly relied upon in proving the two elements noted above. There is, however, no case, other than the decision below, which holds that in connection with an attempt to monopolize claim a party must, in addition to proving antitrust injury to its business and property as required by section 4 of the Clayton Act, prove a substantial effect on competition as required by the Robinson-Patman Act.

Lastly, on this point petitioner would note that the recital by the Circuit Court that a claim for attempt to monopolize must include a showing of "dangerous prob-

ability of success" is in direct conflict with the prior decisions of the Ninth Circuit which have expressly rejected dangerous probability as an element of this offense. Less than four months before the decision in this case, the Ninth Circuit, once again, affirmed the rule that:

> "A prima facie case of attempt to monopolize is made out by evidence of a specific intent to monopolize 'any part' of commerce, plus anticompetitive conduct directed to the accomplishment of that unlawful purpose. *Knutson v. The Daily Review, Inc.*, 548 F.2d 795, 813-14 (9th Cir. 1976); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1276 (9th Cir. 1975); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1051-52 (9th Cir. 1974); *Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1144-45 (9th Cir. 1974); *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 11-13 (9th Cir. 1973); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1973); *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344 (9th Cir. 1970); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964.)
>
> "If proof of an economic market, technically defined, and proof of a dangerous probability of monopolization of such a market were made essential elements of an attempt to monopolize, as a practical matter *the attempt offense would cease to have independent significance*. A single firm that did not control something close to 50 percent of the entire market, see *Twin City Sportservice, Inc. v. Charles O. Finley & Co., supra*, 512 F.2d at 1274, would be free to indulge in any activity however unreasonable, predatory, destructive of competition, and without legitimate business justification. Any concern not

dangerously close to monopoly power could deliberately destroy its competitors with impunity. These are not abstract hypotheses. A market share approaching monopoly is not required to enable one concern seriously to impede the capacity of others to compete by use of abusive trade practices. A construct..n of the Sherman Act that would immunize such practices would be contrary to the purposes of the Act; it is not required by the Act's language or legislative history." *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488 (9th Cir. 1977) *cert. den.* 98 S.Ct. 782.

Again, and as succinctly stated in *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976):

"In sum, we require (1) only specific intent and (2) some illegal (under Section 1) or predatory activity from which specific intent can be inferred." *Id.* at 814.

Notwithstanding this long line of authority in the Ninth Circuit, the Court in this decision held:

"To establish a prima facie case, a plaintiff must prove *three* elements. The first two are specific intent to control prices or destroy competition with respect to a part of commerce (element 1) and predatory conduct directed to accomplishing the unlawful purpose (element 2). (cites omitted). *The third is a 'dangerous probability of success'* (element 3)." (cites omitted) (emphasis added).

Petitioner respectfully submits that the "substantial effect on competition" test set forth in the Robinson-Patman Act is not the exclusive standard for use by courts in this or any other section 2 attempt to monopolize case. In any event, petitioner met the "substantial effect on

competition" requirement at trial in connection with its Robinson-Patman Act claim and also introduced evidence of defendant's 60% market share which in fact showed that the demonstrated restraints were reasonably likely to lead to monopoly.

It is respectfully suggested that this court ought to issue a writ of certiorari to correct the erroneous interjection of a Robinson-Patman Act standard of proof into a section 2 claim and, even though it is not customary, to resolve the direct conflict which presently exists within the Ninth Circuit on whether "dangerous probability of success" constitutes a distinct element of proof in a section 2 case.

B. THE REVIEW AND COMPARTMENTALIZATION OF THE EVIDENCE BY THE CIRCUIT COURT IN A MANNER CONSISTENTLY ADVERSE TO PETITIONER IS A GROSS AND INTOLERABLE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner fully realizes that this Court will not normally issue a writ of certiorari for review and/or correction of evidentiary matters. Petitioner submits that, in this case, where important and far-reaching questions are presented, it would be proper for this Court to issue its writ in order to review the evidence and, most specifically, to re-establish the proposition that a court in determining or reviewing a motion for a directed verdict must view all the evidence and all reasonable inferences which can be drawn from the evidence in the light most favorable to the resisting party.

Petitioner has noted that the Circuit Court has properly stated the rule referenced above. However, once it had done so, the Court proceeded to completely ignore highly significant evidence relied upon by petitioner in resisting the motion for a directed verdict on its section 2 claim. One need not go beyond the written opinion to determine that the evidence considered by the Circuit Court was not only uniformly construed against petitioner but that all inferences drawn from the evidence were likewise construed against petitioner. By way of example only, the Circuit Court stated:

> "Since American was prepared to supply a complete line of different sizes to its customers if they desired, it can be *inferred* that the chain stores bought half gallons in comparatively small amounts. Because of this, we may *conclude* that a predatory price set for half gallons would *not be likely* to drive out or exclude rivals from sales of the product line as a whole, in the absence of predatory pricing in other sizes." (emphasis added).

This drawing of an inference from an inference in favor of defendant and against petitioner was brought to the attention of the Court on petitioner's motion for rehearing. The Circuit Court responded by amending the opinion to read as follows:

> "Since American was prepared to supply a complete line of different sizes to its customers if they desired, the chain stores *must have* bought half gallons in comparatively small amounts. Because of this, we may conclude that a predatory price set for half gallons would not be likely to drive out or exclude rivals from sales of the product line as a whole, in the absence of predatory pricing in other sizes."

This amendment did not begin to cure the erroneous view of the evidence taken by the Circuit Court and was clearly intended to attempt to obscure the fact that the Court had indeed piled inference upon inference in favor of defendant and in violation of the normal rule of judicial review. The fact of the matter is that defendant admitted making sales below cost in sizes other than half gallons including fifths, quarts and pints and the evidence was sufficient to allow an argument that all of defendant's private label gin and vodka sold to chain stores and wholesale accounts in California was, during the period 1961-1967, sold below cost. The further fact is that defendant's own records prepared for the purpose of trial showed that, in 1967, sales of half gallons of vodka admittedly sold below cost by defendant to California chain stores accounted for 27.6% of the total number of cases sold by it to chain stores and 22.8% of all vodka sold by defendant to all California retailers in that year. The decision of the Circuit Court is literally replete with instances where the evidence has not only been construed against petitioner but where direct evidence favorable to petitioner has been, by judicial sleight of hand, rendered somehow supportive of upholding the District Court's order directing a verdict against petitioner.

In addition to ignoring substantial evidence in petitioner's favor and construing the evidence and inferences against petitioner, the written opinion demonstrates that the Circuit Court took each evidentiary element which it perceived might be a basis for petitioner's section 2 claim and separately considered and rejected each item on the ground that, *taken by itself*, it could not form the basis of an attempt to monopolize. This procedure is in direct

conflict with the rule stated by this Court in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 698, 82 S.Ct. 1404 (1962) where the Court in reversing a decision of the Ninth Circuit holding that a directed verdict in favor of defendants should have been entered, stated that:

> "It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id.* at 699.

Petitioner submits that it would be indeed difficult to find an appellate court decision which more effectively dismembered and segregated the unity of evidence offered in support of a claim for attempted monopolization. No review of the record is necessary to support petitioner's assertion. The written opinion is fully demonstrative of the erroneous manner in which the evidence was made subject to appellate review.

In addition to the matters set forth above the Court below, instead of reviewing the facts before it in a manner consistent with judicial standards of review, launched a lengthy pontification on the question of below cost pricing and did so without reference to the manner in which the case was tried below or the relevant economic data appearing in the record. In this connection the Court drew distinctions between what it and certain

non-party lawyers and economists refer to as "marginal" cost and "average variable" costs. The fundamental problem with the court's opinion as it is directed to this matter is that, while it makes interesting reading, it has absolutely no support in the trial record. The only evidence in the record on this point was that the executive vice president of defendant admitted under cross-examination that defendant had sold substantial quantities of its private label gin and vodka to California chain store and wholesale accounts below defendant's cost of production and distribution and that the invoices, freight bills and contemporaneous cost schedules and admissions in answers to interrogatories established that the below cost sales made in California continued from 1961 until at least 1967 and were not confined to a single size of the products in question but included half gallons, quarts, fifths, pints and half pints.

All of defendant's cost and profit related records were taken into evidence at trial. Neither petitioner nor defendant nor the District Court involved themselves in any analysis of cost by reference to such labels as "marginal" or "average variable". Neither were the costs of defendant in any way characterized at trial as "cost of merchandise sold". The only issue for the trial court and the jury was whether the continuous sales by defendant below its cost of production and distribution could be, when taken together with evidence of defendant's dominant position and discriminatory pricing practices, evidence of unreasonable or predatory conduct. In this connection, and while ignoring the evidence of dominance and pricing discrimination, the Circuit Court held that

petitioner had a burden of showing that competitors of defendant were not selling below their cost before a question of fact would arise as to whether defendant's prices could be considered unreasonable. Petitioner submits that if such a showing were required, it was defendant and not petitioner who had the duty to offer evidence of this character as a defense to its below cost pricing tactics.

In this connection petitioner notes that when it was brought to the attention of the Circuit Court that its statement that:

> "Janich produced evidence at trial that American had a price list effective for the period from August 1, 1961 to May 1, 1962, which included a 2,000 case discount price for the full line of 80 proof gin and vodka that was below American's cost for these goods, particularly when freight charges were properly recalculated. But no evidence was produced that products were actually sold at these prices"

was clearly erroneous, the Circuit Court amended its opinion by striking the last line of the above referenced quote and adding in its place the sentence:

> "But it is far from clear from the record that products were actually sold at these prices."

This game-playing with the record is an outrage. The direct written evidence that these prices were below cost and that sales were actually made at these prices was completely uncontroverted at trial. Moreover, these prices were identified as the very mechanism used by defendant to gain initial access to the large California chain store accounts. Again the evidence was uncontroverted.

Petitioner submits that, should it have felt that it was entitled to an instruction on "marginal" or "average variable" costs, defendant could have requested such an instruction. Since the record at trial was complete on the question of what defendant's costs of production, distribution, sales, etc., actually were for gin and vodka, petitioner, when given the reluctant testimony of defendant that its sales were "below cost" and the testimony of others that defendant's below cost prices had the effect of foreclosing competition, was entitled to argue that the below cost prices were unreasonable. Surely a properly instructed jury is entitled to consider this matter and make its determination on all the evidence and in the full context of the issues tried and presented for its resolution.

Finally in these connections, the Circuit Court, in furtherance of its tight compartmentalization of the evidence, held that as a matter of law the failure by the jury to find that defendant's discriminatory pricing practices had a substantial effect on competition operated to *ipso facto* bar submission of petitioner's section 2 claim to the jury. Once again petitioner notes that its section 2 claim was not predicated solely upon discriminatory pricing. Even assuming that discriminatory pricing was the only restraint of trade underlying petitioner's section 2 claim, it simply cannot be said as a matter of law that a jury properly instructed with respect to the law relative to an attempt to monopolize as distinguished from price discrimination might not find that the practices in question in fact had a substantial effect on competition. Clearly the jury verdict was not available to the District

Court in connection with its determination of the motion for directed verdict and the reliance of the Circuit Court upon the verdict returned after instruction on the Robinson-Patman claim, the 21st amendment and other matters not relevant to the section 2 claim is, at best, bootstrap.

Petitioner most respectfully submits that the patently erroneous refusal of the Circuit Court to follow the proper rule relating to appellate review of motions for directed verdict is, in the circumstances of this case and the other issues presented, a compelling reason for the issuance by this Court of the writ prayed for herein.

C. DOES THE OFFICE OF A DISTRICT COURT JUDGE PERMIT SUA SPONTE INTERRUPTION AND ERRONEOUS CONTRADICTION OF COUNSEL DURING THE COURSE OF REBUTTAL ARGUMENT TO A JURY?

Petitioner reluctantly raises as an additional ground for certiorari the unfortunate action of the trial court judge in continuously and quite heatedly interrupting and chastising counsel for petitioner before the jury during the crucial rebuttal stage of trial.

The office of a federal judge carries with it great power. The surroundings accorded to a federal judge are purposely fashioned in such a way as to elevate the law as a principle over the man. A jury quite naturally looks to a federal judge for the legal and, at times, moral guidance without which a jury would founder in its attempt to determine the issues submitted to it. There can be no question but that a federal judge has a position of power and profound influence over a jury empanelled in his court.

In our case the trial court made a practice of commenting on evidence throughout the trial and, although the comments and characterizations were not favorable to petitioner, they were not made at such critical junctures or with undue heat until counsel for petitioner arose to submit final rebuttal argument to the jury. The situation as it occurred was that counsel for defendant had in the space of three hours of extended argument completely failed to mention or attempt to justify defendant's admitted below cost pricing practices. When petitioner's counsel rose for rebuttal this fact was most strongly brought to the attention of the jury. Notwithstanding the dramatic impact which resulted from the jury's attention being drawn to this most glaring of omissions, no objection was made by defendant to this entirely appropriate line of argument. Instead, the trial court, by erroneous evidentiary contradiction of petitioner's counsel and by repeated chastisement made on its own motion and without reference to the record, seriously impugned the credibility of petitioner's counsel and prejudiced petitioner's right to have the jury determine the facts without erroneous characterization by the trial court as to what the record was or what the record could show.

This conduct does not comport with the dignity afforded to the office of a United States District Judge. It can only serve to deprive litigants of their right to jury trial and acts to impede the fair and impartial administration of justice.

The Court of Appeals found, as it was obliged to, that the *sua sponte* instruction by the trial court made to the jury during rebuttal as to a matter of evidence consti-

tuted error. The Circuit Court went on to hold that the error was not prejudicial because it dealt with a matter that was somehow irrelevant. In fact, the instruction made by the trial court went precisely to a matter of fact which established that the prices charged by defendant had the effect of forcing a competitor of defendant to price below cost. How this erroneous instruction can possibly be characterized as "harmless" when it went to the very heart of petitioner's case and specifically related to the interrogatory submitted to the jury on competitive effects which was answered by the jury adversely to petitioner is indeed difficult to conceive. This instruction and other *sua sponte* interruptions and chastisements were more than sufficient to distract the jury's attention from the issues properly before it and to cause the jury to allow the majesty which attaches to a Federal District Court to interfere with its deliberations in a manner profoundly prejudicial to petitioner. When the erroneous instructions of the District Court are considered in light of the fact that the Court, through instruction on treble damages, converted the trial below to a penal proceeding and thereby altered the manner in which the jury would follow the Court's instructions as to the weight of evidence necessary to find a violation, the prejudice is inescapable.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Dated, San Francisco, California,
May 26, 1978.

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-3167

Janich Bros., Inc., Plaintiff-Appellant, vs. The American Distilling Co., Defendant-Appellee.	

[Filed Dec. 14, 1977]

Appeal from the United States District Court
For the Northern District of California

OPINION

Before: Barnes, Choy and Wallace, Circuit Judges

Wallace, Circuit Judge:

This is a private antitrust action for treble damages and injunctive relief pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Plaintiff and appellant Janich Bros., Inc. (Janich) is a rectifier of alcoholic beverages. It processes, bottles, and distributes its product for sale in California. Defendant and appellee The American Distilling Company (American) is a distiller. It manufactures alcoholic beverages and markets its product throughout the United States.

In an action initiated in 1967, Janich claimed that since 1963 American, through its pricing policies, had attempted to monopolize the sale of private label[1] gin and vodka in California in violation of section 2 of the Sherman Act, 15 U.S.C. §2. In addition, Janich claimed that American had sold gin and vodka of like grade and quality at discriminatory prices in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Janich also claimed that as a result of these activities, it was precluded from making sales of private label gin and vodka to large chain store retailers and also suffered a loss of customers and reduced sales to its existing customers. No specific dollar figure was attached to these losses.

American counterclaimed, alleging that Janich, at least since 1962, had engaged in price discrimination in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). In addition, American charged that Janich, since 1961, had engaged in a conspiracy to set prices in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

A jury was selected and after the close of Janich's case, the district judge directed a verdict dismissing the attempt to monopolize claim. At the end of the entire case, the jury returned its verdict in favor of American on Janich's Robinson-Patman claim. Subsequent to the jury verdict, American moved for and the district court ordered a dismissal of the counterclaim.

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[1]Private labels are labels or brand names which are owned and controlled by the retailer rather than by the manufacturer or wholesaler.

The first assigned error in Janich's appeal is that the district judge improperly directed a verdict on the section 2 claim. Janich also asserts numerous errors in the trial judge's admission or exclusion of evidence, his instructions to the jury on the Robinson-Patman claim, and his comments on the evidence. We affirm.

I. *Predatory Conduct*

Janich's primary argument on appeal is that the district court erred in directing a verdict on the attempt claim. In resolving this issue, our task is to determine whether a reasonable jury could have found that American attempted to monopolize. *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 683-84 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). If there is substantial evidence that would support a finding for Janich by reasonable jurors, the directed verdict must be reversed.[2] *Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). In making this determination, we must consider all the evidence and all reasonable inferences which may be drawn from the evidence in a light most favorable to Janich, the party against whom the motion for a directed verdict was made. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1962); *Calnetics*

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[2]Substantial evidence is "more than a mere scintilla." Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). "'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Washington v. United States, 214 F.2d 33, 41 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954).

Corp. v. Volkswagen of America, Inc., supra, 532 F.2d at 684.

Before considering the facts of this case, it is necessary to determine what evidence a plaintiff must introduce to avoid a directed verdict. This is not a simple chores. Even within our circuit we have not provided a clear and meaningful test, although at first glance the requirements established by our cases appear relatively straightforward. To establish a prima facie case, a plaintiff must prove three elements. The first two are specific intent to control prices or destroy competition with respect to a part of commerce (element 1) and predatory conduct directed to accomplishing the unlawful purpose (element 2). *Hallmark Industry v. Reynolds Metals Co.,* 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied,* 417 U.S. 932 (1974) [hereinafter referred to as *Hallmark*]; *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 474 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964); *see Industrial Bldg. Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1344 (9th Cir. 1970). The third is a "dangerous probability of success" (element 3). *Hallmark, supra,* 489 F.2d at 12; *Moore v. Jas. H. Matthews & Co.,* 473 F.2d 328, 332 (9th Cir. 1973); *see Bushie v. Stenocord Corp.,* 460 F.2d 116, 121 (9th Cir. 1972).

While these three elements seem clear, they have not always been interpreted with ordinary meaning. For example, a dangerous probability of success (element 3) does not necessarily require direct proof of market power such that the defendant's actions, if unchecked, would result in actual monopoly. While direct proof of market power is one means of establishing this element, it is not

always essential. *Hallmark, supra,* 489 F.2d at 12; *Moore v. Jas. H. Matthews & Co., supra,* 473 F.2d at 332; *see Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra,* 437 F.2d at 1344. We have held that the trier-of-fact may infer dangerous probability of success from proof of specific intent to control prices or destroy competition in a portion of the market without legitimate business purpose (element 1), accompanied by predatory conduct toward that end (element 2). *Hallmark, supra,* 489 F.2d at 12; *Lessig v. Tidewater Oil Co., supra,* 327 F.2d at 474 & n.46.[3]

The interrelation between the three elements does not necessarily end here, however. In some cases we have also held that the trier-of-fact may infer the first element, specific intent, from proof of the second, predatory or anti-competitive conduct directed to accomplishing the unlawful purpose, *Hallmark, supra,* 489 F.2d at 12; *see Lessig v. Tidewater Oil Co., supra,* 327 F.2d at 475, so long as this conduct can serve as the basis for a substantial claim of restraint of trade.[4] *Hallmark, supra,*

[3]Our holding in *Lessig* was based on the "not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

[4]If this approach is used by the trial court, it should be remembered that the intent which may be inferred from conduct will depend upon the circumstances in which the conduct occurs. For example, the same aggressive conduct which is seen only as a reaction to competition by a small firm may suggest intent to monopolize where carried out by a firm with significant market power. Where a plaintiff relies only upon a defendant's conduct to establish an attempted monopolization claim and does not show market power, specific intent to monopolize should ordinarily be inferred only where the alleged conduct is of a kind clearly threatening to competition or clearly exclusionary. Thus, where

489 F.2d at 12-13; *Bushie v. Stenocord Corp., supra,* 460 F.2d at 121.

While there is great wisdom in requiring proof of each of these three elements separately, we cannot question that at least in the factual situations encompassed by certain of our cases, our circuit has allowed a short-cut method of establishing liability. Thus, while a plaintiff must present substantial evidence on all three elements of attempted monopolization to avoid a directed verdict, proof of predatory or anti-competitive conduct which can serve as the basis for a substantial claim of restraint of trade will, in some circumstances, permit an inference of specific intent and then in turn of dangerous probability. Thus, we may limit our initial task to a determination of whether a reasonable jury could conclude that American engaged in such conduct.

Leaving aside the issue of whether the specified acts could form the basis of a substantial claim of restraint of trade, in this case Janich alleges two separate instances of predatory conduct. It asserts primarily that American maintained a two-tiered system of pricing, with one set of prices for sales outside California and another for sales within California. In addition, it asserts that American carried out a program of below-cost pricing. We deal first with the charge of the two-tiered pricing system.

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the plaintiff does not allege and prove market power (element 3), he must demonstrate conduct which is clearly threatening to competition or clearly exclusionary in order to show "predatory conduct which may form the basis of a substantial claim of restraint of trade." *See generally* L. Sullivan, Antitrust 134-40 (1977). This is the type of circumstantial evidence which may be used to prove the requisite intent.

A. *Discriminatory pricing.*

Janich alleged that American engaged in price discrimination, charging a lower price for goods sold in California than for goods of like grade and quality sold outside of California. Geographical price differentiation presents a different problem from across-the-board price cuts. A firm which cuts its price in a single geographical area and maintains high prices outside of that area may be able to maintain a satisfactory revenue position. Consequently, it may have considerably more staying power than a competing firm which is limited to a single geographical area.

Under these circumstances, it may be possible for a geographically broad-based firm pricing at a cost in a single area to drive out a more efficient competitor which operates only in that area. However, it is unnecessary for us to consider in detail whether the charge of discriminatory pricing in this case lays a basis for recovery. All we need do is look at the overall circumstances to determine if American's geographical price differentiation was sufficient as a matter of law to sustain a charge of attempted monopolization. *See* L. Sullivan, Antitrust, 108-13 (1977).

As a first step, we conclude that a geographical price differential cannot sustain a charge of attempted monopolization unless it is shown to have a substantial effect on competition. In this regard, we take guidance from the Congressional treatment of price differentiation in section 2(a) of the Clayton Act, as amended by the Robinson-

Patman Act, 15 U.S.C. § 13(a).[5] This section prohibits price discrimination between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition."[6]

Where, as here, a price differential threatens a primary line injury, *i.e.* injury to the seller's competitors, section 2 of the Sherman Act, 15 U.S.C. § 2, and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), are directed at the same economic evil and have the same substantive content. Areeda & Turner, *supra,* 88 Harv. L. Rev. at 727. They are both meant to protect the competitive process. *See* L. Sullivan, Antitrust, 684 (1977). Yet in 15 U.S.C. § 13(a), Congress proscribed only those price differences which have a substantial effect on competition. In effect, Congress has determined that price differentiation poses a threat to competition sufficient to justify legal intervention only where such an effect can be shown. Thus, where the plaintiff alleges a geographical price difference as the basis of a section 2 claim, it is appropriate to require the same showing of substantial effect as is required in a Robinson-Patman claim.

[5]Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a), explicitly deals with geographical price discrimination. A private cause of action, however, will not lie for violations of this section. Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); Safeway Stores, Inc. v. Vance, 355 U.S. 389 (1958).

[6]It is clear that there can be no violation of the Robinson-Patman Act if the price differential has no adverse effect on competition. Continental Baking Co. v. Old Homestead Baking Co., 476 F.2d 97, 103 (10th Cir.), *cert. denied,* 414 U.S. 975 (1973); Texas Gulf Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969); Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir. 1964); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 368 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

Having determined that such an effect must be shown, we need go no further. The jury determined that American's price differential had no substantial effect on competition. While this pertained to the Robinson-Patman claim, the issue determined was identical to that which the jury would have been required to decide as part of the section 2 claim. Because of the jury's decision, the section 2 claim would necessarily have been decided against Janich. Thus, even if the district judge erred in granting a directed verdict on the section 2 claim insofar as it was based on geographical price differentiation, a question we do not decide, the error was harmless.

B. *Below-cost pricing.*

A business may choose to price at non-remunerative levels in order to exclude or drive out its rivals. Such "predatory pricing" may be a means of obtaining or maintaining a monopoly position in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. *See, e.g., United States v. American Tobacco Co.,* 221 U.S. 106, 160, 182 (1911); *Standard Oil Co. v. United States,* 221 U.S. 1, 43 (1911).

That legal standard, however, must be applied with a practical understanding of business realities. Even legitimate price decreases will necessarily have a non-remunerative effect upon other firms in the market. These decreases will reduce competitors' profit margins and they

may drive the inefficient firm out of business while the firm which originally reduced prices continues to make a profit. It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws. "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." *International Air Ind., Inc. v. American Excelsior Co.,* 517 F.2d 714, 721 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976), *quoting Anheuser-Busch, Inc. v. FTC,* 289 F.2d 835, 840 (7th Cir. 1961) *and Atlas Bldg. Products Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 487 (1977). Thus, we must exercise great care in differentiating between legitimate price competition and that "predatory pricing" which constitutes a restraint of trade.[7]

While our court has been less than clear in formulating a succinct, definitive test to determine predatory pricing, we have recently given some general guidelines. In *Hanson v. Shell Oil Co.,* 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977), we stated:

> To demonstrate predation, Hanson had to show that the prices charged by Shell were such that Shell was forgoing present profits in order to create a market position in which it could charge enough to obtain supranormal profits and recoup its present losses.

[7]As we have stated on another occasion, "[t]he antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency." Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977).

Janich points to two areas where it contends there was sufficient evidence to go to the jury on this issue. Primarily, it relies on evidence showing that American had sold half gallons of gin and vodka below its cost for these items: gin from 1963 to 1968 and vodka from 1964 to 1968.

But Janich has failed to meet its burden of proof of predatory pricing of the half gallons. Where, as here, a company sells goods in different sizes, it is necessary to determine what is the "product" which is allegedly being sold at a predatory price. The central question is whether liquor sold in different sizes of containers involves separate products.

In this case, several factors suggest that the half gallon alone does not constitute a separate product. The relevant product must be defined with reference to the danger posed by predatory pricing. Pricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits. Areeda & Turner, *supra,* 88 Harv. L. Rev. at 698-99; *see Hanson v. Shell Oil Co., supra,* 541 F.2d at 1358; *International Air Ind., Inc. v. American Excelsior Co., supra,* 517 F.2d at 723. Therefore, the product must be such that if predatorily priced, rivals are likely to be driven out of the market or excluded, allowing the firm to raise prices.

Chain retailers tend to buy gin and vodka either in a full line of sizes or only in the most popular sizes. When

they buy the full line, it is probable that they compare prices in terms of the overall price structure. The pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line, as is the case in this industry, unless this placed the overall price of the line at the predatory level. Yet there was no evidence that the entire line was so priced for the years in question.

It is possible that a given size might be so significant that a chain retailer would select the overall line on the basis of that size. However, half gallons were a small part of American's business in the early 1960's, constituting only 1% of total case sales in fiscal year 1962 and extending up to 4.6% of case sales in fiscal year 1967. Since American was prepared to supply a complete line of different sizes to its customers if they desired, it can be inferred that the chain stores bought half gallons in comparatively small amounts. Because of this, we may conclude that a predatory price set for half gallons would not be likely to drive out or exclude rivals from sales of the product line as a whole, in the absence of predatory pricing in other sizes.

Even where the chain retailers buy less than the whole line, the evidence indicates that they emphasize purchases of fifths and quarts. Therefore, a predatory price for half gallons alone would not tend to drive out or exclude rivals.

Thus, while we do not hold that a single size in a product line may never be a product for purposes of predatory pricing, based upon the facts of this case, half gallons of gin or vodka do not constitute a separate product

for the years in which they were allegedly predatorily priced.

The remaining record pertaining to alleged predatory pricing is even less persuasive. Janich produced evidence at trial that American had a price list effective for the period from August 1, 1961 to May 1, 1962, which included a 2000-case discount price for the full line of 80 proof gin and vodka that was below American's cost for these goods, particularly when freight charges were properly recalculated. But no evidence was produced that products were actually sold at these prices. In addition, the district judge found a total absence of evidence showing the prices at which other distillers, rectifiers or wholesalers were selling comparable products during the time the price list was allegedly in effect. Thus, Janich failed to show that the price list was evidence of any wrongful behavior by American.

Even if the price list were proven relevant, we fail to see how that evidence would be sufficient to go to the jury. We did indicate in *Hanson* that predatory pricing "could be shown by evidence that Shell was selling its gasoline at below marginal cost or, because marginal cost is often impossible to ascertain, below average variable costs." 541 F.2d at 1358. To determine whether Janich's price list evidence can qualify, we must consider the terms used.

As implied in *Hanson*, an across-the-board price set at or above marginal cost[8] should not ordinarily form the

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[8]The firm's marginal cost "is the increment to total cost that results from producing an additional increment of output." Areeda & Turner, *supra*, 88 Harv. L. Rev. at 700.

basis for an antitrust violation. First, a firm setting its price equal to marginal cost will injure other firms more than it will injure itself only if the others are less efficient. More efficient firms will be losing less or even operating profitably. Second, a rule requiring a firm to increase its price above marginal cost in order to avoid a charge of illegal conduct would operate to reduce production, causing a loss of output which could be produced at a cost equal to or lower than its value to consumers.[9] For both reasons, therefore, "pricing at marginal

[9]In economic analysis, the marginal cost of a good is construed as the cost to society of that good, for its production requires resources which could be used in the production of other goods. The price which people are willing to pay to obtain the good is construed as the social value of the good. However, different people have different limits on the amount they are willing to pay to obtain the good. As prices decline more people are willing to buy. For a firm to sell more goods, prices must be reduced.

As a matter of short-run economic welfare, it is beneficial to increase production and lower prices so long as price exceeds marginal cost. In other words, so long as there are people who are willing to pay an amount for the good which is above its marginal cost, it is socially beneficial to continue to increase production. Of course this will require a continued reduction in prices in order to sell the full amount produced. Thus, social welfare is maximized in the short run at that production level where the price of the good equals its marginal cost. Where the firm raises its price above marginal cost, it will not be able to sell as many goods and will have to reduce production. Where this occurs, there is a loss to society of all that additional output which the firm could produce by lowering its price to marginal cost and producing at the welfare maximization level. *See* F. Scherer, Industrial Market Structure and Economic Performance 15-19 (1970).

This analysis is based upon short-run welfare maximization. In the long run there are complications. *See* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 883-89 (1976). However, long-run economic welfare consequences are "intrinsically speculative and indeterminate" and, in considering the limitations of the judicial process, are properly disregarded in formulating a test for predatory pricing. Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891, 896-97 (1976).

cost is the competitive and socially optimal result." Areeda & Turner, *supra*, 88 Harv. L. Rev. at 711.

At the same time, pricing below marginal cost is socially wasteful. A seller who sets his price below marginal cost will be producing goods at a cost which is greater than their value to consumers.[10] In addition, setting prices below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the price-setting firm. Accordingly, setting prices below marginal cost may well form the basis for an antitrust violation.

However, a firm's marginal costs cannot be ascertained from conventional business records. Conventional records do provide information which a jury can use as evidence of marginal cost. Average variable cost[11] is likely to approximate marginal cost. Areeda & Turner, *supra*, 88 Harv. L. Rev. at 700 n.13, 716-17 & n.42. Thus, as stated in *Hanson*, average variable cost can be used as evidence of marginal cost.

[10]See note 9 supra.

[11] Variable costs . . . are costs that vary with changes in output. They typically include such items as materials, fuel, labor directly used to produce the product, indirect labor such as foremen, clerks, and custodial help, utilities, repair and maintenance, and per unit royalties and license fees. The average variable cost is the sum of all variable costs divided by output.

Areeda & Turner, *supra*, 88 Harv. L. Rev. at 700.

Average variable cost is sometimes construed as including only costs of production. When this is the case, sales costs and costs of warehousing and transportation for outgoing goods are analyzed separately. *See, e.g.*, F. Scherer, The Economics of Multi-Plant Operation 21 (1975). For purposes of this analysis, however, these costs should also be treated as variable if they are charged on the firm's books as direct expenses rather than investment for purposes of depreciation and tax. Areeda & Turner, *supra*, 88 Harv. L. Rev. at 720 & n.48, 728.

By introducing the alleged price list, Janich did not produce evidence that American's prices were below its average variable costs. The cost referred to in the list was "cost of merchandise sold." However, cost of merchandise sold is not the equivalent of average variable cost. Cost of merchandise sold is an accounting formula used by American to meet the requirements of the Securities and Exchange Commission It includes costs of spirits and bottling supplies, direct labor costs, indirect labor costs, depreciation on the plant, real estate and personal property taxes, bonds and licenses, and warehousing and shipping costs. Some of these items are not variable costs; that is, some are costs which do not vary with output. While materials, direct labor, indirect labor, and warehousing and shipping costs are costs which vary with output, plant depreciation, real estate and personal property taxes, and business licenses are considered to be fixed costs because they do not vary with output. Thus, a price which is below "cost of merchandise sold" is not necessarily below average variable cost.

If the items involving fixed costs could be subtracted from "cost of merchandise sold," only variable costs would remain and it would be possible to arrive at a proper measure of cost for purposes of this action. In American's cost study, however, items of fixed cost were intermingled with certain items of variable cost in the general category of overhead. Items of fixed cost cannot be separated out. Thus, with the record in its present state, it is not possible to determine if American's 1961-

62 listed prices for gin and vodka were below average variable cost.

Because Janich bears the burden of proof in establishing its attempted monopolization claim, *see Hallmark, supra,* 489 F.2d at 13, it bears the burden of showing each element of that claim—including predatory conduct. On the basis of the present record, and even assuming that the products were sold at the prices indicated on the price list, Janich has not come forth with sufficient evidence to go to the jury on a contention that American sold gin and vodka below average variable cost for the period 1961-62.

In summary, we hold that the district court was correct in concluding that Janich did not produce sufficient evidence to go to the jury on the question of whether American had engaged in predatory pricing in a product line in either gin or vodka. The evidence concerning the full line of gin and vodka in 1961-62 was deficient as to actual sales and, in addition, the evidence of prices which were below the cost of merchandise allegedly sold for the items in question was inadequate to demonstrate that the prices were below average variable cost. With respect to the evidence concerning prices of half gallons between 1963 and 1968, half gallons do not constitute a product line for the years in question. Thus, without reaching the issue of whether the specified acts could form the basis of a substantial claim of restraint of trade, we conclude that on these facts no reasonable jury could determine that American was engaging in predatory pric-

ing. Consequently, insofar as the attempt to monopolize claim was founded on predatory pricing, a directed verdict against Janich was proper.

II. *Direct Evidence of Specific Intent*

In addition to presenting evidence of alleged predatory pricing (element 2) in order to sustain an inference of the other two elements of attempted monopolization, Janich also sought to present direct evidence on the issue of American's specific intent to monopolize (element 1). The evidence offered but rejected was testimony by Mr. Moise Silber. Silber would have testified that he was told by Mr. Roy Sherwin, a former salesman for American, that Sherwin and Mr. Buck, the executive vice-president of American, had engaged in several conversations over the years during the course of which Buck had stated that American was going to lower the prices on gin and vodka in California, run the rectifiers out of business and then increase prices.

American objected and the court excluded the testimony on the grounds that, although Buck's statements could be admitted into evidence as an admission by a party opponent, the statements made by Sherwin to Silber were incurable hearsay. We agree that the statements were hearsay and that there was no exception to the hearsay rule under which Sherwin's statement could be admitted into evidence.

Janich argues that Sherwin's alleged statement "served to identify him as a participant in civil and criminal wrong-doing" and therefore was a declaration against interest under California Evidence Code § 1230 and the

Proposed Federal Rules of Evidence 804(b) (4), reprinted at 56 F.R.D. 183, 321.[12] However, there are certain foundational requirements for the declaration against interest exception to the hearsay rule. Among these is the requirement that the declarant must be shown to be unavailable. Cal. Ev. Code § 1230, Proposed Fed. R. Evid. 804(b) (4). In this case, counsel for Janich made conclusory allegations that Sherwin was outside the jurisdiction of the court. This is inadequate. Under California law, "'unavailable as a witness' means that the declarant is . . . [a]bsent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process." Cal. Ev. Code § 240(a) (5). There was no evidence that Janich exercised diligence in attempting to procure the presence of Sherwin. *See People v. Linder,* 5 Cal. 3d 342, 486 P.2d 1226, 96 Cal. Rptr. 26 (1971); *People v. Beyea,* 38 Cal. App. 3d 176, 113 Cal. Rptr. 254 (1974).

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[12]At the time of trial, prior to the adoption of the Federal Rules of Evidence, admission of evidence in civil cases was governed by Fed. R. Civ. P. 43(a), which provided in part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.

The clause that evidence is admissible "under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity" was interpreted to mean that the federal rule could be deduced from general principles and related federal decisions although there was no stated equity principle available. C. Wright, Federal Courts § 93, at 457 (3d ed. 1976); *see* New York Life Ins. Co. v. Harrington, 299 F.2d 803, 808 (9th Cir. 1962). Thus, if he chose, the trial judge could consider the Proposed Federal Rules of Evidence in his evaluation of general principles.

Thus, the declaration against interest exception was not available under California law.

Under federal law the result does not differ.[13] The Proposed Federal Rules of Evidence provided, at the time of trial in 1974, that "'unavailability as a witness' includes situations in which the declarant: . . . [i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." Proposed Fed. R. Evid. 804(a) (5).

Janich also argues that the Sherwin statements were admissible as statements of a co-conspirator under Cal. Ev. Code § 1223. However, § 1223 is applicable only if certain requirements are met, including the following: (1) the statement was made by the declarant while he was participating in a conspiracy to commit a crime or a civil wrong; (2) the statement was made in furtherance of the objectives of that conspiracy; and (3) the statement was made by the declarant prior to or during the time that such party also was participating in that conspiracy. Cal. Ev. Code § 1223. Janich failed to show participation by Sherwin in any form of conspiracy. Moreover, Janich made no attempt to show that Sherwin's alleged declaration was in furtherance of the objective of a conspiracy. Thus, the admission of a co-conspirator exception was not available.

Finally, Janich argues that Sherwin's statement was admissible for such non-hearsay purposes as to show the orders of a superior, American's pattern of doing business, and its motive and intent. Upon a review of the

[13]See note 12 *supra*.

record, we disagree. Moreover, even if the statement would have been probative on these matters, there is some question about the trustworthiness of the offered hearsay. Silber testified that Buck would lose his temper on occasion and that he was an eccentric man. Silber testified that Sherwin was a man who "loved himself" and who tried to make himself seem important to others. Considering the questions of trustworthiness, the trial judge could have properly concluded that the probative value of the hearsay testimony was substantially outweighed by danger of unfair prejudice. Cal. Ev. Code § 352, Proposed Fed. R. Evid. 403, 56 F.R.D. 183, 218.

III. *Other Allegations of Error*

Janich also alleges that the trial court erred in instructing the jury during plaintiff's summation that it should not consider American's action in filing and failing to prosecute its counterclaim as evidence of anti-competitive intent. The court ruled that the pleadings were not in evidence because they were superseded by a pre-trial order. Although the docket indicates the entering of a pre-trial order, such an order was not included in the record on appeal. The filing of the counterclaim and the failure to prosecute were not in evidence, however, for reasons unrelated to the pre-trial order.

Statements made in a pleading may be admitted against the pleader as evidence in the form of judicial admissions without the introducion of the pleadings. 4 Wigmore, Evidence § 1064 (Chadbourn rev. 1972); *but see* McCormick, Evidence § 265 (2d ed. 1972). Nevertheless, in this case it was not statements made in the counterclaim but the

very filing of the counterclaim and the failure to prosecute which were the evidentiary facts. Janich never brought this information to the attention of the jury during its presentation of evidence. As a result, American was never afforded the opportunity to present explanatory evidence. We conclude that the filing of the counterclaim and the failure to prosecute this claim were not in evidence. Thus, Janich is foreclosed by the well-settled rule that it is improper in closing argument to make reference, over objection, to matters not in evidence. *Musgrave v. Union Carbide Corp.*, 493 F.2d 224, 231 (7th Cir. 1974).

Janich also alleges that the court erred in instructing the jury during its summation that there was no evidence in the record that sales of gin and vodka by Lewis Westco, a competitor of American's, were below cost. While the record is somewhat ambiguous on this point, we feel that the court did err, for there was evidence that Lewis Westco had been charged by the California Department of Alcoholic Beverage Control with below-cost pricing. Although the hearing examiner had held in favor of Lewis Westco, the department director had reversed. Although the director's decision had been appealed, the decision constituted some evidence that Lewis Westco was engaged in below-cost pricing according to the standards used by the control board.

While there was error, we do not believe that the district judge's ruling was prejudicial. Janich argues that Lewis Westco's below-cost pricing shows the anti-competitive effect of American's pricing. We disagree. There was no evidence concerning the circumstances surrounding the incident with which Lewis Westco was charged. Nor was there evidence concerning the extent of Lewis Westco's below-cost pricing in terms of product, time or price. Because there was no proof of any causal connection between American's pricing policies and Lewis Westco's below-cost pricing, the evidence, even if admitted, would have been insufficient to show that American's pricing had an adverse effect on competition. Thus, the ruling of the district judge was harmless error; it could not have prejudiced Janich's substantial rights. Fed. R. Civ. P. 61; *see Hallmark Industry v. Reynolds Metals Co., supra*, 489 F.2d at 14; *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

Janich next alleges that the court erred in overruling Janich's motion to strike certain testimony of Sanford Coplin, the president of Lewis Westco, who was a witness for Janich. Janich had been questioning Coplin concerning Lewis Westco's pricing. Coplin had testified that American's prices to Safeway during 1972 were lower than its regular posted price. Coplin also testified that this had resulted from the low prices which Lewis Westco was charging to Lucky Stores. In reaction to this, Janich's counsel asked the following question:

> You mean that there is some differential between prices posted by American for sales to Safeway and the price being charged by American for sales of gin and vodka to Safeway?

In response, Coplin stated as follows:

> Well, in the State of California you have the right of competitive filing, which allows a seller of distilled

spirits to meet the lowest price charged in the industry without being in jeopardy of selling below costs.

Janich immediately moved to strike the answer on the ground that it stated a legal conclusion, and that it was non-responsive and volunteered. The motion was denied. Considering the prior testimony, we believe that the answer was responsive. Coplin was giving his understanding of the law as an explanation for the price differential. Immediately after denying Janich's motion, the district judge instructed the jury that it was not to accept the witness's statement as a correct description of the law, but only as a statement of the witness's understanding. The judge added that if California law was applicable to any issue in the case, the court would give a statement of the law to the jury. Thus, the judge dispelled any danger that the jury would apply Coplin's interpretation of the law in its deliberations.

Janich also alleges that the district judge erred in continuously commenting upon, adding to and summarizing evidence to the prejudice of the plaintiff. Upon a full review of the record, we have determined that the trial judge carried out his responsibilities in a fair and impartial manner. There is no indication that Janich was subject to prejudicial treatment.

Finally, Janich alleges two errors in the jury instructions for the Robinson-Patman claim concerning damages. It alleges that the district judge erred in instructing the jury that the theory of damages in antitrust cases is not to recoup unlawfully gained profits. It also alleges that the court erred in instructing the jury that Janich's damages would be trebled if the jury held in its favor. However, we need not determine whether these instructions constituted error because the jury never reached the issue of damages. It decided against Janich on the specific ground that American's differential pricing did not have the requisite anti-competitive effect to constitute a violation of the Robinson-Patman Act. Upon a review of the record, we have determined that this finding is supported by the evidence. Because the jury's determination necessarily meant that American had no liability, any error in instructions concerning damages was not prejudicial. *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 852 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

We have carefully reviewed the remaining issues which Janich raises. We find that they are without merit.

AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-3167

Janich Bros., Inc.,
Plaintiff-Appellant,
vs.
The American Distilling Co.,
Defendant-Appellee.

[Filed Mar. 1, 1978]

AMENDMENT OF OPINION AND DENIAL OF REHEARING

Before: Barnes, Choy and Wallace,
Circuit Judges

The Opinion filed in the above matter on December 14, 1977, is amended as follows:

Page 9, line 19 of typed Opinion (page 3246, slip op., left column, fourth and fifth lines, first full paragraph), the words "it is probable that" are deleted and the word "doubtless" is inserted before the word "compare."

Page 10, lines 1 and 2 of typed Opinion (page 3246, slip op., left column, twelfth and thirteenth lines of second full paragraph), the words "it can be inferred that" are

deleted, and the words "must have" are inserted after the word "stores"; page 10, lines 24-25 of typed Opinion (page 3246, slip op., right column, eleventh, twelfth and thirteenth lines of second full paragraph), the sentence beginning with "But no evidence" and ending with "at these prices" is deleted and inserted in its place is the following sentence: "But it is far from clear from the record that products were actually sold at these prices."

The panel as constituted has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

The United States District Court
for the Northern District of California

No. 47103 CBR

Janich Bros., Inc., a corporation, Plaintiff, vs. The American Distilling Company, a corporation, Defendant.	

[Filed June 17, 1974]

JUDGMENT

This action having come on for trial before the Court and jury, the Honorable Charles B. Renfrew, United States District Judge, presiding, and the issues having been duly tried; and, on motion of the defendant duly made at the close of the plaintiff's case, the Court having directed a verdict in favor of the defendant on plaintiff's claim for alleged attempt to monopolize in claimed violation of Section 2 of the Sherman Act; and the defendant having advised the Court out of the presence of the jury that unless evidence appeared in the course of the trial supporting the counterclaim it would move to dismiss the counterclaim at the close of the case, and no other men-

tion having been made in the course of the trial concerning the said counterclaim; and the Court having instructed the jury to decide factual issues submitted to it by way of special interrogatories with respect to the plaintiff's claim for alleged discriminatory sales alleged to have been made in violation of Section 2(a) of the Clayton Act, as amended, (commonly referred to as the "Robinson-Patman Act"); and on May 29, 1974, the jury having duly returned a verdict in favor of the defendant with respect to the plaintiff's alleged Robinson-Patman Act claim; and the plaintiff having made no effort or attempt to urge upon the Court plaintiff's claim for injunctive relief as prayed for in the complaint and supplemental complaint;

It Is Hereby Ordered And Adjudged that the complaint and supplemental complaint against the defendant The American Distilling Company herein be and the same are hereby dismissed with prejudice and the defendant may have and recover its cost of suit incurred herein from plaintiff; the counterclaim of defendant is hereby dismissed upon application of the defendant.

Dated: June 17, 1974.

/s/ Charles B. Renfrew
United States District Court Judge

Appendix D

STATUTES INVOLVED

(1) At the time of trial below 15 U.S.C. §2 provided that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(2) 15 U.S.C. §13 provides:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only

due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the

Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

(3) 15 U.S.C. §15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(4) Rule 50(a) of the Federal Rules of Civil Procedure provides:

"A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even

though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."